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DISTRESSING SPEECH AFTER *SNYDER*—WHAT'S LEFT OF IIED?

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ABSTRACT—Speech has the potential to cause devastating emotional injury. Yet it has been less than a century since intentional infliction of emotional distress—a tort designed to punish a person who, through outrageous conduct or speech, intentionally causes severe distress to another—has entered the scene. When the tortfeasor acts through speech alone, the First Amendment is inevitably implicated. In 2011, the Supreme Court took its most recent stance on the constitutionality of punishing distressing speech when it decided *Snyder v. Phelps*. Despite the reprehensibility of the speech involved, the Court properly immunized the speech from tort liability for emotional distress. The Court has already suggested that IIED actions face a constitutional bar for public figures and for private figures embroiled in a matter of public concern. This Note picks up the IIED doctrine where *Snyder* left off and argues that the First Amendment should bar most IIED actions even against a private figure where the speech relates to a matter of private concern. This result flows from the difficulty in distinguishing between public and private matters, the danger of silencing unpopular speech, and the positive value that injurious speech can have.

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INTRODUCTION

Few would dispute the notion that speech can be harmful and distressing. Consider the malicious prankster who falsely told a woman her husband had suffered a serious car accident,[1] the team doctor who intentionally misdiagnosed one of his football players with a fatal disease,[2] or the school administrators who accused a teenage girl of unchaste behavior and threatened her with imprisonment.[3] It was against this backdrop of outrageously distressing conduct and speech that the law gradually began to recognize a tort action for the intentional infliction of emotional distress (IIED). But the law has guarded liability for emotional distress closely, and the courts have always expected America's citizenry to endure the vast majority of insults, vulgarities, and other interpersonal stressors they encounter.

IIED has proven especially problematic when plaintiffs seek to recover for distressing speech rather than for conduct. In a variety of pure-speech contexts, the Supreme Court has found that the First Amendment's demand for the free exchange of ideas trumps the need to compensate individual emotional distress. Most recently, the behavior of the Westboro Baptist Church (Westboro) brought IIED into the public consciousness in the 2011 case *Snyder v. Phelps*.[4]

Westboro's incendiary protests have made it a nationwide poster child for hate and intolerance despite its low membership. The church is best known for its vitriolic anti-gay protests at the funerals of military

[1] *See* Wilkinson v. Downton, [1897] 2 Q.B. 57.

[2] *See* Chuy v. Phila. Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (en banc).

[3] *See* Johnson v. Sampson, 208 N.W. 814 (Minn. 1926).

[4] 131 S. Ct. 1207 (2011).

servicemen and servicewomen.[5] The church teaches that the deaths of service men and women are God's punishment for America's tolerance of homosexuality,[6] and the protesters carry signs with slogans such as "GOD HATES FAGS," "FAGS BURN IN HELL," "THANK GOD FOR DEAD SOLDIERS," "GOD HATES AMERICA," and "AMERICA IS DOOMED."[7] Westboro has picketed approximately 600 funerals in the past 20 years.[8]

The funeral of Marine Lance Corporal Matthew Snyder was one of the 600. Matthew died in the line of duty in Iraq.[9] His parents held his funeral at St. John Catholic Church in his hometown of Westminster, Maryland.[10] Before the service, Matthew's father, Albert, placed an obituary in the newspaper, and Westboro targeted the funeral for protest.[11]

On the day of the service, Westboro devotees engaged in a small protest. In addition to their usual placards, they carried signs that were allegedly directed personally at Matthew—who was Catholic as well as a Marine—that read "God Hates You," "You're Going To Hell," "Semper Fi Fags," and "Priests Rape Boys."[12] Albert Snyder did not view the signs before or during the funeral, and Westboro did not interrupt the service, but the protest still aggrieved him.[13] He filed suit for IIED, among other charges.[14] A jury found for Albert Snyder, but the Fourth Circuit reversed the verdict.[15] The Supreme Court then held 8–1 for Westboro, and Chief Justice Roberts's majority opinion suggested that the First Amendment bars IIED actions for speech about matters of public concern.[16]

While it was not addressed in the majority opinion, Westboro did not drop its focus on Matthew Snyder after his funeral. Shortly afterwards, it published an online "epic" that took more direct aim at Matthew Snyder and his family than had the somewhat generic signs at the funeral.[17] Titled

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[5] *Id.* at 1213.

[6] *Id.*

[7] *About Westboro Baptist Church*, GODHATESFAGS, http://www.godhatesfags.com/wbcinfo/about wbc.html (last visited Jan. 17, 2013).

[8] *Snyder*, 131 S. Ct. at 1213. On its website, Westboro claims that it has participated in 49,310 demonstrations since June of 1991 and that it has picketed more than 400 funerals of service members killed in Iraq and Afghanistan. *About Westboro Baptist Church*, *supra* note 7.

[9] *Snyder*, 131 S. Ct. at 1213.

[10] *See* Deana Pollard Sacks, Snyder v. Phelps, *the Supreme Court's Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. ONLINE 193, 196 (2010).

[11] *Snyder*, 131 S. Ct. at 1213.

[12] *Id.* at 1216–17; *id.* at 1226 (Alito, J., dissenting).

[13] Snyder v. Phelps, 533 F. Supp. 2d 567, 572 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207.

[14] *Snyder*, 131 S. Ct. at 1214.

[15] *Id.*

[16] *Id.* at 1220–21.

[17] *Snyder*, 533 F. Supp. 2d at 572.

"The Burden of Marine Lance Cpl. Matthew Snyder," the writing lambasted Matthew's parents for having "taught [him] to defy his creator" and for "rais[ing] him for the devil."[18] It also accused the Snyders of having taught their son:

> how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. . . . They . . . taught Matthew to be an idolater.
>
> . . . .
>
> Then after all that they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life . . . .[19]

Although the Court's opinion did not address the epic, Justice Breyer expressed concern about it during oral argument, worrying in particular about the protection the First Amendment would offer to distressing speech communicated via the Internet.[20] Perhaps it was this discomfort with the implications of the Internet for speech-based IIED actions that led Justice Breyer to concur separately in the case.[21]

This Note applauds the Supreme Court's conclusion as correct and argues that the First Amendment poses an even higher bar to liability for injurious speech than the Court has so far found. Part I lays out the necessary background, beginning in Part I.A, which discusses the development of IIED, including the law's hesitancy to recognize emotional damages and the high hurdles a plaintiff must clear to recover. Part I.B introduces the restrictions the First Amendment places on IIED actions. It also outlines the jurisprudence surrounding defamation, as the Court has borrowed the framework it established for defamation as an analytical tool in IIED actions. This includes drawing distinctions between public and private figures and matters of public and private concern. Part I.B concludes by discussing low-value speech doctrines and placing these doctrines in the IIED context with some possible implications of the holding in *Snyder*.

In Part II, this Note suggests that the First Amendment should bar IIED claims even when injurious speech is intentionally directed at a private person and the speech relates to a matter of private concern. Despite the emotional harm such speech can inflict, Part II.A emphasizes the difficulty in distinguishing between matters of public and private concern, Part II.B the risks of viewpoint discrimination, and Part II.C the value of even intentionally injurious speech. Part II.D examines the implications for the workplace and the Internet. Despite the unique challenges presented by

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[18] *Id.*

[19] *Snyder*, 131 S. Ct. at 1226 (Alito, J., dissenting).

[20] Transcript of Oral Argument at 12–14, *Snyder*, 131 S. Ct. 1207 (No. 09-751).

[21] *Snyder*, 131 S. Ct. at 1221 (Breyer, J., concurring).

these and other situations, this Note counsels that the First Amendment should nonetheless bar most IIED claims. A brief conclusion follows.

I. BACKGROUND

A. IIED: Development and Restrictions

IIED is a tort of recent vintage. Courts were reticent to award damages for emotional distress a century ago, and the tort did not gain general acceptance until the mid-twentieth century. This section outlines the gradual recognition of IIED in the literature and in the courts. It also discusses the tight controls that courts placed on IIED even as they began to acknowledge it.

1. The Birth of IIED.—For most of Anglo-American legal history, emotional distress unaccompanied by tangible harm was insufficient to support an action in tort[22] for various reasons,[23] and courts generally denied recovery even when the emotional harm was severe and intentional.[24] Still, by the close of the nineteenth century, emotional damages were sometimes recoverable.[25] So long as a plaintiff could make an independent cause of action fit the facts (even nominally) and serve as a predicate injury, additional awards for emotional distress were common.[26]

Early cases that prompted the rise of interest in emotional distress damages included particularly abhorrent practical jokes, extreme insults, threats, abusive commercial practices, and the exploitation of authority,

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[22] *See, e.g.*, PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 54–55 (W. Page Keeton et al. eds., 5th ed. 1984) ("[T]he law has been slow to accept the interest in peace of mind as entitled to independent legal protection . . . ."); Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 125–26 (2010) (noting the denial of recovery for mental suffering in the absence of physical harm or contact).

[23] Among the objections was the difficulty of measuring damages. *See, e.g.*, Lynch v. Knight, (1861) 11 Eng. Rep. 854 (H.L.) 863 (appeal taken from Ir.) ("Mental pain or anxiety the law cannot value, and does not pretend to redress . . . ."). Other courts found the emotional distress to be too remote to be foreseeable, thus rendering the conduct not a proximate cause of the harm. *See, e.g.*, Braun v. Craven, 51 N.E. 657, 659 (Ill. 1898) ("Appellee might have reasonably anticipated that his acts would cause excitement, or even fright; but fright and excitement so seldom result in a practically incurable disease that . . . such a result could not have been expected."). Finally, there was the fear of a "slippery slope" wherein courts would be inundated with a flood of litigation by people who had suffered from slighted feelings. *See* Mitchell v. Rochester Ry., 45 N.E. 354, 354–55 (N.Y. 1896) ("If the right of recovery [for fright is] established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation.").

[24] *See* William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939).

[25] *Id.* at 880.

[26] *See* William L. Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 42–43 (1956); *see also, e.g.*, Kurpgeweit v. Kirby, 129 N.W. 177, 180 (Neb. 1910) (affirming a jury award for emotional "assault" based on the predicate injury of technical trespass).

special relationships, or peculiar vulnerabilities. A prankster who falsely told a woman her husband had been seriously hurt incurred liability,[27] as did others who buried a secret "pot of gold" that they persuaded an emotionally frail woman to dig up, causing her public humiliation and a mental breakdown.[28] In the early twentieth century, the law also came to compensate victims of threats and insults when the defendant had a special relationship or duty toward the distressed plaintiff.[29] Contrary to the previously held view that liability could arise in these situations only by contract, some courts found liability for shouting profanity at a person in the home,[30] and several courts found that "indecent proposals" directed at women warranted damages.[31] Misuse of authority was the common theme of several other claims, including one involving a detective who accused a woman of wartime espionage out of personal animus[32] and another in which school administrators accused a high school girl of unchaste behavior and threatened her with imprisonment.[33]

Courts also proved willing to find liability without physical injury in cases against creditors who used harassing, humiliating, or cruel collection methods or against insurance agents who applied pressure to force a settlement.[34] Finally, several early cases found liability for the mishandling, mutilation, or misplacement of dead bodies.[35] While these types of cases sometimes pointed to property rights, contractual rights, or other nominal

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[27] *See* Wilkinson v. Downton, [1897] 2 Q.B. 57.

[28] *See* Nickerson v. Hodges, 84 So. 37, 38–39 (La. 1920).

[29] *See, e.g.*, Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 28 (Ala. 1926) (innkeeper); Weber-Stair Co. v. Fisher, 119 S.W. 195 (Ky. 1909) (theater owner); Gillespie v. Brooklyn Heights R. Co., 70 N.E. 857, 863 (N.Y. 1904) (common carrier).

[30] *See, e.g.*, Voss v. Bolzenius, 128 S.W. 1 (Mo. Ct. App. 1910) (finding the defendant liable for yelling offensive names while driving past the plaintiff's house); Levine v. Trammell, 41 S.W.2d 334, 334–35 (Tex. Civ. App. 1931) (holding a landlord liable for verbally abusing a tenant during an eviction).

[31] *See, e.g.*, Leach v. Leach, 33 S.W. 703 (Tex. Civ. App. 1895) (finding liability for attempt to seduce a married woman); Craker v. Chi. & Nw. Ry., 36 Wis. 657 (1875) (holding that an unwanted kiss gave rise to liability).

[32] *See* Janvier v. Sweeney, [1919] 2 K.B. 316.

[33] *See* Johnson v. Sampson, 208 N.W. 814 (Minn. 1926).

[34] *See, e.g.*, Clark v. Associated Retail Credit Men of Washington, D.C., 105 F.2d 62, 66–67 (D.C. Cir. 1939) (reversing the dismissal of an emotional distress claim after a man suffered physical injuries from the emotionally distressing conduct of bill collectors); Barnett v. Collection Serv. Co., 242 N.W. 25, 28 (Iowa 1932) (affirming a jury award of emotional distress damages for the harassing conduct of a bill collector).

[35] *See, e.g.*, Larson v. Chase, 50 N.W. 238 (Minn. 1891) (finding a right to possession of a dead body for family members and allowing an action for emotional distress damages when the body was mishandled); Gostkowski v. Roman Catholic Church of the Sacred Hearts of Jesus & Mary, 186 N.E. 798 (N.Y. 1933) (affirming a jury verdict awarding emotional distress damages for family members after the deceased relative's body was moved to a different cemetery plot).

torts, commentators observed that the courts were really compensating purely emotional distress.[36]

Scholar and jurist Thomas Atkins Street declared mental anguish "parasitic," meaning that it could help determine damages but could not independently support liability.[37] He also correctly predicted that allowing mental anguish to enter the damages calculus would lead to its emergence as an independent basis for liability.[38] Still, when the American Law Institute (ALI) published its first *Restatement of the Law of Torts* in 1934, it excluded emotional distress as a basis for liability because "the interest in freedom from disagreeable emotions is not . . . sufficiently important to make even its intentional invasion actionable unless the act [alleged] . . . also constitutes an invasion of some more perfectly protected interest."[39]

Despite this official denunciation,[40] by the 1930s it was no longer accurate to describe IIED as insufficient to support liability.[41] Many courts and scholars had begun to recognize emotional distress as an independent ground for recovery.[42] Academia helped shape IIED's evolution,[43] and in 1938, Dean Prosser, who would be one of the tort's primary architects, heralded its emergent autonomy in his article, *Intentional Infliction of Mental Suffering: A New Tort*.[44]

Against this changing legal backdrop, the *Restatement*'s contributors reversed their 1934 position on IIED in the 1948 supplement. Section 46 of the volume recognizes the independent tort of IIED, imposing liability on a person "who, without a privilege to do so, intentionally causes severe

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[36] *See* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936); Prosser, *supra* note 24, at 881–86.

[37] 1 THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY 461 (1906).

[38] *Id.* at 470.

[39] RESTATEMENT OF TORTS ch. 2, intro. note, at 26 (1934).

[40] *Id.* § 46 cmt. c (noting that conduct "intended . . . to cause . . . emotional distress is not tortious").

[41] The English case *Wilkinson v. Downton*, [1897] 2 Q.B. 57, is recognized as pioneering the recognition of purely emotional harm as sufficient for the award of damages. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 22, § 12, at 60.

[42] *See* Magruder, *supra* note 36, at 1067 ("[C]ourts have already given extensive protection to feelings and emotions."); Rapp, *supra* note 22, at 131.

[43] *See* Rapp, *supra* note 22, at 131–32. Some have argued that scholars invented IIED, while others have contended that Prosser and his contemporaries did not invent the notion of emotional distress, but rather expanded the principles of isolated cases to a cogent doctrine. *Compare* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 (1982) (arguing that scholars declared the availability of compensation for emotional distress and the *Restatement* followed suit), *with* Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 587 (1993) (arguing that scholars merely expanded the principle of compensation for emotional distress).

[44] *See* Prosser, *supra* note 24; *see generally* Fowler V. Harper & Mary Coate McNeely, *A Re-Examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426 (developing the idea of liability for emotional harm); Magruder, *supra* note 36 (illustrating the willingness of courts to compensate emotional harm).

emotional distress to another."[45] In 1965, under the guidance of Dean Prosser as Reporter, the committee for the *Restatement (Second) of Torts* redefined the test for IIED.[46] Section 46 extends liability to anyone "who by extreme and outrageous conduct intentionally or recklessly cause[d] severe emotional distress" and to any resulting bodily harm.[47] Commentary to section 46 makes it clear that outrageous conduct is a prerequisite to liability.[48] Malicious or even criminal intent to cause suffering is insufficient in the absence of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . in a civilized community."[49] The commentary further explains that a case meets the outrageousness standard where "recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"[50]

Today, all fifty states and the District of Columbia recognize IIED in at least some situations.[51] Many jurisdictions have adopted section 46's definition in one form or another.[52] Most break the tort into four elements[53]: (1) the defendant either intended to inflict emotional distress or caused it recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant caused the plaintiff's distress, and (4) the distress was severe.[54] Actions for IIED largely turn on the outrageousness of the conduct alleged[55]—so much so that the tort is also commonly known as "outrage."[56]

2. Early Limitations on the Tort.—Widespread recognition of IIED did not eliminate concerns about compensating emotional distress.[57] Scholars and jurists persisted in their fears that allowing recovery would open the floodgates to expansive litigation over hurt feelings.[58] The

[45] RESTATEMENT OF TORTS § 46 (Proposed Final Draft No. 7, 1947).

[46] RESTATEMENT (SECOND) OF TORTS § 46 (1965).

[47] *Id.* § 46(1).

[48] *See id.* § 46 cmt. d.

[49] *Id.*

[50] *Id.*

[51] *See* John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 806, app. B (2007).

[52] *See id.* at 806.

[53] *See* Givelber, *supra* note 43, at 46.

[54] *See, e.g.*, Limone v. United States, 579 F.3d 79, 94 (1st Cir. 2009); Milo v. Martin, 311 S.W.3d 210, 217 (Tex. App. 2010).

[55] *See* Christina Wells, *Regulating Offensiveness:* Snyder v. Phelps, *Emotion, and the First Amendment*, 1 CALIF. L. REV. CIRCUIT 71, 83 (2010) ("Outrageous action is the core element of IIED.").

[56] *See, e.g.*, Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2117 (2007); Prosser, *supra* note 26.

[57] *See supra* note 23.

[58] *See* Prosser, *supra* note 24, at 877.

outrageousness requirement became the bulwark against such frivolities.[59] Dean Prosser readily acknowledged that each of us "must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind."[60]

While courts have made it clear that outrageous conduct must be extreme to support liability, they have done relatively little to articulate more concrete standards.[61] Due to this lack of guidance, courts have produced an IIED jurisprudence that is "extremely fluid and invariably responds to changing cultural sensibilities."[62] Because IIED is an ever-evolving tort, it seems likely that many of the early cases cited by Prosser and Magruder no longer qualify as outrageous under modern standards of propriety. By the same token, cases involving sexual voyeurism and degradation not necessarily considered outrageous in the tort's infancy now result in liability.[63] While one might expect such a malleable standard to lead to the long-feared avalanche of litigation, most observers conclude that the IIED floodgates have never opened.[64]

This nebulous quality of IIED has led courts in several jurisdictions to relegate it to the status of "gap-filler" tort.[65] Texas, for example, bars plaintiffs who are capable of articulating a different theory of recovery from proceeding under IIED.[66] This approach is typical of the states that

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[59] *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) ("The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.").

[60] Prosser, *supra* note 24, at 887.

[61] *See* Givelber, *supra* note 43, at 74 ("Courts are literally left to their own devices to figure out whether conduct qualifies as outrageous.").

[62] Chamallas, *supra* note 56, at 2126.

[63] *See* Russell Fraker, Note, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 992 (2008) (citing Am. Guarantee & Liab. Ins. Co. v. 1906 Co., 273 F.3d 605, 612–14 (5th Cir. 2001) (finding photography studio liable for IIED when employee used hidden cameras in models' dressing rooms); Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1002–03, 1009 (N.M. 1999) (finding IIED liability for a supervisor's sexually explicit speech towards employees, breast-groping, and other sexual harassment of subordinates)).

[64] *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 171 (1982) ("Empirical studies show that the volume of litigation in response to the judicial recognition of new torts has not been overwhelming."); Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 127 (1990) (noting that there were only about 600 reported cases citing the *Restatement (Second)* section 46 during the 1980s).

[65] *See* Fraker, *supra* note 63, at 1009.

[66] *See* Creditwatch, Inc. v. Jackson, 157 S.W.3d 814, 815–16 (Tex. 2005) (finding that IIED claims are barred if any other cause of action could provide recovery, whether statutory or common law, and even if not before the court or procedurally barred); Hoffmann-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 448–50 (Tex. 2004) (holding that claims for IIED are precluded when the "gravamen" of the case is any other tort); *see also* Sara Ruliffson, Comment, *R.I.P. I.I.E.D.: The Supreme Court of Texas Severely Limits the Tort of Intentional Infliction of Emotional Distress*, 58 BAYLOR L. REV. 587, 592–99 (2006) (discussing the impact of these decisions on Texas tort law).

treat IIED as a tort of last resort.[67] Other jurisdictions have been inconsistent in determining whether IIED is strictly a gap filler.[68] While a majority of jurisdictions and the *Restatement (Second)* recognize IIED as an independent tort,[69] this doctrinal confusion shows that even today courts remain hesitant to compensate emotional distress.

B. Constitutional Limitations on IIED and Other Speech Torts

Actions for IIED have proven especially problematic when the malefactor acts through speech alone. It is not surprising that courts have been reluctant to punish injurious speech: First Amendment speech protections are favored and vital, while emotional distress is a traditionally disfavored basis on which to award relief. That courts have been reluctant to punish injurious speech absent other conduct should come as no surprise given the vitality of First Amendment speech protections and our discomfort with compensating emotional distress. In the 1980s, the Supreme Court's *Hustler Magazine, Inc. v. Falwell* decision explicitly acknowledged that imposing liability for hurtful speech risks chilling expression, implicating the First Amendment. This section discusses that decision and the intertwined Court doctrine for defamation actions. It then discusses *Snyder* and the state of the law for IIED claims after the decision.

1. Hustler Magazine v. Falwell.—In 1983, *Hustler* magazine ran a full-page parody of an advertisement for liqueur featuring the Reverend Jerry Falwell giving a fictional interview about his "first time."[70] While the "ads" ultimately revealed that the "first times" discussed were the subjects' first samplings of the liqueur, they meant to invoke the impression that the celebrities were discussing their sexual firsts.[71] In the magazine parody, Falwell revealed in his "interview" that his "first time" took place in a "drunken incestuous rendezvous with his mother in an outhouse."[72] The "ad" also featured a "statement" from Falwell that he preached only while drunk and suggested that he was a hypocrite.[73]

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[67] *See, e.g.*, Dickens v. Puryear, 276 S.E.2d 325, 327–28, 336 (N.C. 1981) (holding an IIED claim barred when assault and battery were applicable, despite the fact that the statute of limitations had lapsed for both claims but not for the IIED claim).

[68] *See* Fraker, *supra* note 63, at 997 & n.57.

[69] *See id.* at 996 & nn.53–55.

[70] *Jerry Falwell Talks About His First Time*, HUSTLER, November 1983, at inside of front cover; *see* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48 (1988). Actual ads for Campari had featured other celebrities giving similar interviews. *Id.*

[71] *Hustler*, 485 U.S. at 48.

[72] *Id.*

[73] *Id.*

A unanimous Supreme Court held that parodies like the one in the magazine are entitled to a high level of First Amendment protection.[74] Writing for the Court, Chief Justice Rehnquist stressed the importance of the free flow of ideas about issues of public concern.[75] He then emphasized the right of American citizens to subject their public officials and figures to criticism, even when that criticism is not "reasoned or moderate."[76] In dismissing Falwell's argument that the magazine's malicious intent should place it beyond constitutional protection, Chief Justice Rehnquist found that intent to harm does not render speech unprotected.[77]

The Court also held that outrageousness, the showing required for success in an IIED claim, amounted to an invitation to jurors to silence unpopular or offensive speech, a result forbidden by the First Amendment.[78] The Court borrowed ideas from the canonical defamation case, *New York Times v. Sullivan*,[79] in fashioning its opinion. Chief Justice Rehnquist wrote that because of the overriding importance of free-flowing public debate, "public figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing . . . 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true."[80] The Court set this actual malice standard to give the requisite "'breathing space' to the freedoms protected by the First Amendment."[81]

2. Detour: Importing Defamation Law into IIED Jurisprudence.—The doctrinal framework relied upon by Chief Justice Rehnquist in the *Hustler* decision had been established as the Court gradually "constitutionalized" the law of defamation. Falwell argued that this analysis was inapposite because he was suing for emotional distress damages and not reputational damage, but the Court found the same First Amendment interests in protecting the free exchange of ideas to be implicated in each type of case.[82] Commentators have noted the imprecise fit of the actual malice standard for IIED claims—the Court in *Hustler* did not explain why it was adopting it.[83] IIED claims compensate victims for

[74] *See id.* at 50. Justice Kennedy took no part in the decision, and Justice White filed a concurring opinion. *Id.* at 47.

[75] *Id.* at 50–51.

[76] *Id.* at 51.

[77] *Id.* at 53.

[78] *Id.* at 55–56 (citing FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978); Street v. New York, 394 U.S. 576, 592 (1969)).

[79] 376 U.S. 254 (1964).

[80] *Hustler*, 485 U.S. at 56.

[81] *Id.*

[82] *Id.* at 52–53.

[83] *See* Catherine L. Amspacher & Randel Steven Springer, Note, *Humor, Defamation and Intentional Infliction of Emotional Distress: The Potential Predicament for Private Figure Plaintiffs*, 31 WM. & MARY L. REV. 701, 715–17 (1990). Concurring in the judgment in *Hustler*, Justice White

different harms than defamation actions: the former addresses the internal harm and emotional suffering of the speech while the latter punishes its outer, reputational effects.[84] Moreover, successful IIED claims do not hinge on truth or falsity as do defamation claims.[85] Professor Smolla argues that it is "logically indefensible" to lift the *New York Times* actual malice standard from defamation and apply it literally to IIED.[86] *New York Times* involved the publication of an allegedly defamatory advertisement, and the actual malice standard was crafted to ensure protection for a newspaper that might inadvertently publish falsehoods,[87] a concern that is inapplicable in IIED actions. But the adoption makes more sense if looked at from the perspective of the speaker, as the danger of chilling speech looms large in both types of actions.[88] Despite his criticisms, Smolla applauds the big-picture utilization of *New York Times*'s ideals because doing so reaffirms the First Amendment's prohibition on the punishment of speech solely because of its emotional content.[89] Professor Post argues that the references to actual malice make sense because, like *Hustler*, the driving concern in both cases is the protection of public discourse.[90] Whatever the ultimate

commented that *New York Times v. Sullivan* had "little to do with this case," as he saw its holding to be limited to factual assertions and not parody or statements of opinion. *Hustler*, 485 U.S. at 57 (White, J., concurring).

[84] Amspacher & Springer, *supra* note 83, at 716.

[85] Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of* Hustler v. Falwell, 20 ARIZ. ST. L.J. 423, 430 (1988). Before the case's ascendance to the Supreme Court, the Fourth Circuit latched onto this idea in *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986). The court determined that the *New York Times* case had not modified the elements of a cause of action for defamation, but simply raised the fault level required. Accordingly, it imported the "reckless" or "intentional" fault levels from the case into the IIED context to find *Hustler* liable for intentionally causing Falwell emotional distress. *Id.* at 1274–76.

[86] Smolla, *supra* note 85, at 439.

[87] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256–57, 279–81 (1964). During the Civil Rights Movement, the *New York Times* published a full-page advertisement accusing the police of Montgomery, Alabama, of harassing and stifling the efforts of Dr. Martin Luther King, Jr. and fellow activists. *Id.* at 257–58. Though the advertisement did not mention him by name, the elected police commissioner accused the *Times* of defaming him. *Id.* at 258.

[88] *See* Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197, 1203–05 (2009) (discussing the barriers that have been erected to tort actions for defamation, intentional and negligent infliction of emotional distress, and invasion of privacy because of the potential chilling effect that these claims can have on expression and the media); *see also* Daryl L. Wiesen, Note, *Following the Lead of Defamation: A Definitional Balancing Approach to Religious Torts*, 105 YALE L.J. 291, 316–21 (1995) (proposing "religious torts," a jurisprudential framework analogous to defamation, because of the similar First Amendment concerns of stifling expression and the free exercise of religion).

[89] Smolla, *supra* note 85, at 440–42.

[90] Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 612–13 (1990). *See generally* David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493 (1990) (proposing a single, unified constitutional theory to govern all tort actions based on speech).

rationale, the Court's importation of defamation principles suggested that the distinctions between private and public concern and between public and private figures would continue to inform IIED analysis. Such distinctions have governed defamation law since *New York Times v. Sullivan*, where the Court first began placing First Amendment restrictions on defamation claims, and the standards have been developed further in subsequent decisions.

Before 1964, there was little suggestion that the First Amendment might present a bar to defamation claims.[91] Justice Brennan's *New York Times* opinion changed this by holding that a newspaper's false statements of fact about a public official were protected unless "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[92] Mistakes and impugned reputations, the Court wrote, were the unavoidable side effects of giving speech the "breathing space" it needed to survive. To hold a newspaper to higher standards would strike an unacceptable balance because it would risk chilling speech. The Court noted that "debate on public issues should be uninhibited, robust, and wide-open" even when it includes "vehement, caustic, and sometimes unpleasantly sharp attacks."[93]

Just three years later, the Court in *Curtis Publishing Co. v. Butts* extended the actual malice standard to include public figures as well as public officials.[94] In 1971, a Justice Brennan-led plurality decided *Rosenbloom v. Metromedia, Inc.*[95] and extended the actual malice standard again; this time, private figures embroiled in an event of general public interest could not collect without showing actual malice.[96] Justice Brennan's opinion refused to give greater weight to society's interest in protecting individual reputations than to the First Amendment interest in preventing self-censorship.[97]

However, Justice Brennan's *Rosenbloom* opinion could not command a majority and induced spirited dissents from Justices Harlan and Marshall.[98] Then, only three years later, the Court declined to extend the

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[91] *See* Alain Sheer & Asghar Zardkoohi, *An Analysis of the Economic Efficiency of the Law of Defamation*, 80 NW. U. L. REV. 364, 368 (1985).

[92] *N.Y. Times*, 376 U.S. at 279–80.

[93] *Id.* at 270.

[94] 388 U.S. 130, 155 (1967). In *Butts*, the privately employed athletic director at the University of Georgia brought a libel suit against Curtis Publishing after an article in the *Saturday Evening Post* accused him of fixing a football game between Georgia and Alabama. *Id.* at 135–36.

[95] 403 U.S. 29 (1971) (plurality opinion).

[96] A distributor of nudist magazines was arrested and tried for the alleged sale of obscene materials but was ultimately acquitted. He was unable to recover in his libel action against the radio station that reported that the materials seized from him had been obscene. *Id.* at 32–36.

[97] *Id.* at 49–50.

[98] *See id.* at 71–72 (Harlan, J., dissenting) (criticizing the Court for "single-minded devotion" to avoiding the evils of self-censorship and eschewing the proper balancing that should weigh reputational

actual malice rule in *Gertz v. Robert Welch, Inc.*[99] The case presented an issue that fit seamlessly into the *Rosenbloom* paradigm,[100] but Justice Powell's opinion modified the *Rosenbloom* analysis. Private figures could collect actual damages, such as demonstrable loss of income or business opportunity, by showing that the publishing had been negligent; but they were required to show actual malice to win punitive or presumed damages.[101] The Court relied on two crucial differences between public and private figures to justify the distinction: public figures (1) enjoy superior access to the media themselves and therefore have a channel to combat defamatory attacks and (2) have typically enmeshed themselves in public affairs or thrust themselves into the spotlight, whereas private figures have not.[102] The *Gertz* opinion represented the state of the law of defamation for roughly a decade.

In 1985, the Court finally reached the issue of liability for defamation in a case between two private figures concerning a private matter. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[103] Justice Powell's plurality opinion held that because such private situations are unlikely to chill speech, the First Amendment does not bar the imposition of both actual and punitive damages for falsehoods that were negligently published without actual malice.[104] Thus, after *Dun & Bradstreet*, the permissible bounds of liability for defamation are more or less clear: (1) public officials and figures must show actual malice to collect, (2) private figures defamed about a matter of public concern can collect actual damages for negligently published falsehoods but must show actual malice to collect punitive or presumed damages, and (3) private figures defamed about a matter of private concern can collect actual and punitive damages by demonstrating that the defendant published negligently.[105]

Determining what qualifies as defamation in the first place implicates a separate line of doctrine. This qualification matters because defamatory speech is entitled to no constitutional protection, whereas merely false speech or statements of opinion, even those that can cause emotional distress, generally are. Under previously firm doctrine, defamation claims

interests more heavily); *id.* at 79 (Marshall, J., dissenting) (doubting the judiciary's ability to accurately differentiate matters of public and private concern).

[99] 418 U.S. 323 (1974).

[100] A conservative magazine printed false statements accusing a private-figure attorney of subversive communist activities in connection with his representation in a high-profile lawsuit. *Id.* at 325–26.

[101] *Id.* at 349–50.

[102] *Id.* at 344–45.

[103] 472 U.S. 749 (1985) (plurality opinion). Dun & Bradstreet, a credit reporting agency, inadvertently sent a report to five of its subscribers erroneously indicating that Greenmoss, a construction contractor, had filed a petition for bankruptcy. *Id.* at 751.

[104] *Id.* at 761.

[105] *See, e.g.*, Sheer & Zardkoohi, *supra* note 91, at 398.

were permissible under the First Amendment because there was thought to be "no constitutional value in false statements of fact."[106] In *Gertz*, Justice Powell included falsities in the categories of speech that receive no protection at all.[107] This notion was affirmed by several of *Gertz*'s progeny.[108] However, the Court recently revisited this issue and found otherwise in *United States v. Alvarez*.[109] A Justice Kennedy-led plurality reasoned that defamatory or fraudulent speech is not unprotected solely because the speech is false, but also because of its defamatory nature or other legally cognizable harm associated with it.[110] Thus, a law targeting false speech, without more, had to meet the usual demanding tests of speech restrictions.[111] Justice Kennedy acknowledged the evils of false speech but prescribed "speech that is true" as the proper remedy because of its ability to enlighten and correct the lie.[112] While a false statement of fact may be a new recipient of constitutional protection, unpopular and pernicious opinions have long received full protection.[113]

The Court has long been careful to protect statements of opinion, including those that tread perilously close to defamation. *Greenbelt Cooperative Publishing Ass'n v. Bresler* forbade a state from imposing liability for "rhetorical hyperbole" on the grounds that a reader would not understand the publication to be stating actual facts but would read it with its rhetorical goal in mind.[114] In *Philadelphia Newspapers, Inc. v. Hepps*, the Court required defamation plaintiffs to prove that the allegedly defamatory statements or publications were false.[115] The *Hepps* Court recognized that this burden would insulate from liability those false

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[106] *Gertz*, 418 U.S. at 340.

[107] *Id.* at 340.

[108] *See, e.g.*, BE&K Constr. Co. v. NLRB, 536 U.S. 516, 531 (2002) ("[F]alse statements may be unprotected for their own sake . . . ."); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (noting that false statements are valueless because they "harm both the subject of the falsehood *and* the readers of the statement"); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.").

[109] 132 S. Ct. 2537 (2012). At issue was the Stolen Valor Act, 18 U.S.C. § 704 (2006), which criminalized lying about receiving certain military decorations. *Alvarez*, 132 S. Ct. at 2542. Alvarez was indicted under the Act when he inexplicably lied at a public meeting about being wounded during battle and receiving the Congressional Medal of Honor. *Id.*

[110] *Alvarez*, 132 S. Ct. at 2545.

[111] *Id.* at 2549 (noting that the government had a compelling interest in protecting the integrity of the Medal of Honor, but that the Stolen Valor Act was too broad and reached too much protected speech).

[112] *Id.* at 2550. Justice Kennedy noted that counter-speech had been an adequate remedy in the case at bar; Alvarez had been ostracized and exposed as a "phony." *Id.* at 2549.

[113] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

[114] 398 U.S. 6, 11–14 (1970).

[115] 475 U.S. 767, 776 (1986).

statements that were not provably false, but it considered this effect a necessary evil to avoid chilling protected speech.[116]

Finally, just two years after *Hustler* refused to impose liability in part because no reasonable person could read the parody in that case to state actual facts, the Court decided *Milkovich v. Lorain Journal Co.*[117] Writing for the Court, Chief Justice Rehnquist found that not all opinions are constitutionally protected from tort liability.[118] Noting that subsequent courts had misinterpreted Justice Powell's dictum in *Gertz* to equate opinions with ideas, the Court rejected the notion of blanket constitutional protection for all statements of opinion.[119] Because it would be counterintuitive "if a writer could escape liability . . . simply by using . . . the words 'I think,'" a statement of opinion asserting an objectively false fact is actionable.[120] *Milkovich* thus prevented speakers from avoiding liability by masquerading false statements of fact as opinion. It was this defamation-based decision that the Fourth Circuit would heavily rely upon nearly two decades later when it confronted the IIED case of a grieving military father suing a small Topeka-based church for disrupting his son's funeral.

3. Snyder v. Phelps.—At the time of Matthew Snyder's funeral, Westboro's small congregation consisted of between sixty and seventy members, roughly fifty of whom are blood relatives to founder Fred Phelps.[121] When Westboro learned of Snyder's funeral, the picketers it elected to send to Maryland included Phelps, two of his children, and four of his grandchildren.[122] The group staged demonstrations at three locations: the streets abutting Maryland's State House, the United States Naval Academy at Annapolis, and Snyder's funeral.[123]

Significantly, Westboro notified the authorities of its intent to picket Snyder's funeral ahead of time and fully complied with police instructions to stand in a 10-by-25-foot fenced-in area approximately 1,000 feet from the funeral site and separated from it by several buildings.[124] The protesters displayed signs, sang hymns, and recited Bible verses for approximately

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[116] *Id.* at 778.

[117] 497 U.S. 1 (1990). An editorial column in an Ohio newspaper accused a high school wrestling coach of lying his way out of trouble at an investigatory hearing. *Id.* at 3–5. The hearing was conducted to investigate an altercation that had occurred between two wrestling teams in which several people were injured. *Id.* at 4.

[118] *Id.* at 18–19.

[119] *Id.* at 18.

[120] *Id.* at 19 (quoting Cianci v. New Times Publ'g Co., 639 F.2d 54, 64 (2d Cir. 1980) (Friendly, J.)).

[121] Sacks, *supra* note 10.

[122] Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011).

[123] *Id.*

[124] *Id.*

half an hour before the funeral, but they did not yell or interrupt the funeral in any way.[125]

While the protestors were not visible from the site of the funeral, the funeral procession did pass within a few hundred feet of them.[126] The fallen Marine's father, Albert Snyder, testified that he could see the tops of the placards as he drove to the funeral but could not actually read what the signs said.[127] When Snyder saw the picketing later that evening on television, it caused him severe emotional harm, which was exacerbated by his subsequent discovery of the online epic.[128]

Snyder testified that he became so upset after viewing the epic that he vomited and cried for hours.[129] He also asserted ongoing mental suffering and stated that he remained depressed and became irate whenever he thought about the incident.[130] Several times throughout the trial, a tearful Snyder had to leave the courtroom to compose himself.[131] Expert witnesses corroborated Snyder's testimony, suggesting that the incident had caused him severe depression and adversely affected his preexisting health problems.[132]

Snyder filed suit alleging five state tort claims: IIED, intrusion upon seclusion, civil conspiracy, defamation, and publicity given to private life.[133] The district judge granted summary judgment for Westboro on the defamation and publicity given to private life claims, but a jury returned a verdict for Snyder on the remaining three counts and awarded $2.9 million in compensatory damages and $8 million in punitive damages.[134] Though a flurry of post-trial motions by Westboro convinced the judge to remit the punitive damages award to $2.1 million, the court left the jury's verdict otherwise undisturbed.[135]

On appeal, the Fourth Circuit reversed the verdict and found both Westboro's picketing and the epic to be constitutionally protected speech.[136] The decision relied primarily on two factors: first, the speech regarded a matter of public concern, and second, it was not provably true.[137]

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[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] Snyder v. Phelps, 533 F. Supp. 2d 567, 572 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207.

[129] *Id.*

[130] *See Snyder*, 131 S. Ct. at 1214.

[131] *Snyder*, 580 F.3d at 213, *aff'd*, 131 S. Ct. 1207.

[132] *Snyder*, 131 S. Ct. at 1214.

[133] *Id.*

[134] *Snyder*, 533 F. Supp. 2d at 573.

[135] *Snyder*, 131 S. Ct. at 1214.

[136] *Snyder*, 580 F.3d at 211.

[137] *Id.* at 222–25.

Citing *Milkovich*, the court cast the speech as hyperbolic rhetoric, which enjoys absolute protection from tort liability.[138]

The Fourth Circuit's decision provoked a substantial amount of commentary. Some of the literature criticized the extension of *Hustler*'s First Amendment protection in IIED suits to cases that involved private figures like Snyder.[139] When the Supreme Court granted certiorari, several other commentators were perplexed by the Court's decision to consider the case, especially in light of Westboro's emphatic First Amendment victory in the Fourth Circuit.[140] Finally, a host of commentators applauded the Fourth Circuit's decision and urged the Supreme Court to raise the First Amendment bar to IIED claims even higher.[141]

The Court returned an 8–1 decision in favor of Westboro.[142] Chief Justice Roberts's opinion focused largely on whether or not the speech was a matter of public concern. This inquiry was essential because speech on public issues "occupies the highest rung" on the speech hierarchy and receives "special protection," while First Amendment protections of speech regarding purely private matters "are often less rigorous."[143] The Court acknowledged that the line between public and private concern may often defy precise definition, but it prescribed a few principles to guide the inquiry.[144]

Chief Justice Roberts suggested that the public concern umbrella is broad enough to encompass speech "fairly considered as relating to any matter of political, social, or other concern to the community, or [to] . . . a subject of legitimate news interest."[145] Private speech, on the other hand, includes speech that relates solely to private business matters and speech by

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[138] *Id.* at 222–26.

[139] *See, e.g.*, W. Wat Hopkins, Snyder v. Phelps, *Private Persons and Intentional Infliction of Emotional Distress: A Chance for the Supreme Court to Set Things Right*, 9 FIRST AMENDMENT L. REV. 149, 189–92 (2010) (arguing that private persons should face a lesser burden to recovery in IIED claims as they do in libel claims); Jeffrey Shulman, *Free Speech at What Cost?:* Snyder v. Phelps *and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 313–16 (arguing that the Fourth Circuit improperly balanced the interests of vigorous public debate against the right of individuals to be free from abuse).

[140] *See, e.g.*, Hopkins, *supra* note 139, at 150.

[141] *See, e.g.*, Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 303–06 (lamenting the subjectivity of an outrageousness standard and arguing that it is an inappropriate mechanism for regulating speech against either public or private figures); Wells, *supra* note 55, at 86 (urging that no liability for emotional distress should be allowed without "external indicia of harm" or in the event that speech falls into an unprotected category).

[142] Snyder v. Phelps, 131 S. Ct. 1207 (2011).

[143] *Id.* at 1215 (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)) (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)).

[144] *Id.* at 1216 (quoting City of San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam)).

[145] *Id.* at 1216 (quoting *Connick*, 461 U.S. at 146; *San Diego*, 543 U.S. at 83–84) (internal quotation mark omitted).

a public employee unrelated to his position or employing agency.[146] Chief Justice Roberts also cautioned that the nature of the distinction between public and private concern defies a one-size-fits-all test and that each case will require a facts- and circumstances-specific analysis.[147]

The majority opinion placed Westboro's speech firmly in the realm of public concern. Because Westboro's aim was to reach as broad an audience as possible and because the signs spoke to its views on societal issues of considerable import, the fact that the "messages . . . [fell] short of refined social or political commentary" was insufficient to remove them from the public arena.[148] Even the signs readily construed as directed specifically toward Matthew Snyder, such as "You're Going to Hell" and "God Hates You," were unpersuasive evidence that the speech was private, as "the overall thrust and dominant theme" of the demonstration pertained to important public issues.[149]

Finally, Chief Justice Roberts found tort liability for IIED in these circumstances unpalatable because it would invariably depend on Westboro's viewpoint.[150] He reasoned that protestors standing in the same spot holding signs proclaiming "God Bless America" or "God Loves You" would never be subject to tort liability.[151] Elementary First Amendment principles command that the "government may not prohibit the expression of an idea simply because society finds the idea itself offensive."[152] The prohibition against viewpoint-based liability thus undermines IIED's outrageousness standard, which Chief Justice Roberts saw as an invitation to the jury to impose liability based on its disdain for the message presented.[153] The Court concluded that the First Amendment therefore requires society to tolerate insulting and outrageous speech on matters of public concern, lest the marketplace of ideas be denied adequate "breathing space."[154]

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[146] *Id.* at 1216 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (plurality opinion)).

[147] *Id.* at 1216.

[148] *Id.* at 1217.

[149] *Id.* Westboro's selection of a public street for protest further buttressed its case. *Id.* at 1218. Public spaces like these that are utilized for public assembly, demonstration, and debate have long received special protection. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (Roberts, J.). These public forums are still subject to reasonable time, place, and manner restrictions, and many states have enacted laws restricting funeral demonstrations. *Snyder*, 131 S. Ct. at 1218. However, Maryland did not have such a statute in effect at the time of Matthew's funeral. *Id.*

[150] *Snyder*, 131 S. Ct. at 1219.

[151] *Id.*

[152] *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[153] *Id.*

[154] *Id.* (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

The majority opinion did not address the legal significance of the epic.[155] In his concurrence, Justice Breyer pointed this out and emphasized the narrowness of the holding.[156] Alone in dissent, Justice Alito could not ignore the epic, which he saw as evidence that the demonstration had been a personal attack on the Snyders.[157] Furthermore, even if the protest generally regarded a matter of public concern, he did not think that Westboro could bury actionable speech targeting Matthew Snyder's religion by interspersing it with protected speech protesting the war.[158]

4. The First Amendment Straitjacket on IIED After Snyder.—*Snyder* further developed standards for when an IIED claim may proceed in the face of First Amendment concerns. *Hustler* disallows liability for anything short of actual malice when a public figure is the subject of the distressing publication. The *Snyder* Court assumed that Albert Snyder was a private figure, yet it insulated Westboro from liability for IIED. One might thus assume that private figures would have a difficult time succeeding on an IIED claim when the malefactors who torment them are speaking on a matter of public concern.

Some peculiarities of the case temper such an inference by offering future courts reasonable bases on which to distinguish future IIED cases. First and foremost, the protesters stood 1,000 feet away and complied with the instructions of law enforcement. Furthermore, Albert Snyder did not see the placards they bore until he watched television later that evening. The protests took place in a traditional public forum, and while some of the attacks seemed personally directed at the Snyders, the "overall thrust and dominant theme" regarded an issue of public concern.[159] These factors made a finding of liability difficult to fathom, produced a narrow opinion, and have led commentators to question its value and even the decision to grant certiorari in the first place.[160]

Moreover, some exchanges at oral argument hinted that the analysis might have differed had Westboro engaged in protest that more aggressively and proximately confronted Snyder in person, or in other words, was more "up in [Snyder's] grill."[161] In light of these potential

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[155] Snyder did not include the epic in his cert. petition, which may have led the Court to decline including it in its discussion. *Id.* at 1214 n.1.

[156] *Id.* at 1221–22 (Breyer, J., concurring).

[157] *Id.* at 1225–26 (Alito, J., dissenting).

[158] *Id.* at 1226–27. Justice Alito also contended that the Fourth Circuit erred in its reliance on *Milkovich*, but did so solely on the grounds that *Milkovich* was a defamation case and thus did not apply to IIED actions. *Id.* at 1228.

[159] *Id.* at 1217 (majority opinion).

[160] *See, e.g.*, Alan Brownstein & Vikram David Amar, *Afterthoughts on* Snyder v. Phelps, 2011 CARDOZO L. REV. DE NOVO 43, 43 (suggesting that the Court did not need to grant certiorari in light of the resounding First Amendment victory given by the Fourth Circuit).

[161] Transcript of Oral Argument at 49, *Snyder*, 131 S. Ct. 1207 (No. 09-751).

caveats, it is necessary to outline those categories of speech that have been categorically excepted from First Amendment protections: fighting words and true threats.

5. Speech of Lesser Value.—The Court's First Amendment jurisprudence has made clear that certain types of low-value speech can be regulated and proscribed. Defamatory speech is subject to liability because of the potential for palpable reputational harm.[162] The Court has likewise excluded from First Amendment protection speech that constitutes "no essential part of any exposition of ideas, and [that is of] such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[163] Since *Hustler*, defamation law has had important collateral consequences for IIED.[164] But two other low-value speech categories, fighting words and true threats, also may influence an analysis of speech protection in the context of IIED.

a. Fighting words.—Beginning with its decision in *Chaplinsky v. New Hampshire*, the Court developed the fighting words doctrine to ensure that a state did not go too far in criminalizing speech that was "offensive, derisive, or annoying."[165] Under the fighting words rule, states may criminalize only those words that are so "opprobrious . . . or abusive . . . [that they] tend[] to cause a breach of the peace."[166] The exact scope of the doctrine has narrowed over time. When the *Chaplinsky* Court first announced it, the rule was broad enough to include words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[167] The fighting words doctrine thus permitted states to criminalize "disorderly words" that could cause deep offense.[168]

Eventually, the Court began to pull back from the *Chaplinsky* standard. Reasoning that the Constitution protects the right of a speaker to express her emotions and that word choice affects the emotive impact of speech, Justice Harlan's 1971 opinion in *Cohen v. California*[169] refused to

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[162] United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012).

[163] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *Chaplinsky* featured a pamphleteer outside of city hall in Rochester, New Hampshire, who decried a city marshal as a "damned Fascist" and a "God damned racketeer" when attempts were made to move him. *Id.* at 569–70.

[164] *See supra* notes 79–90 and accompanying text.

[165] *Chaplinsky*, 315 U.S. at 569.

[166] Gooding v. Wilson, 405 U.S. 518, 519, 523 (1972).

[167] *Chaplinsky*, 315 U.S. at 572.

[168] *See id.* at 573.

[169] Cohen v. California, 403 U.S. 15 (1971). *Cohen* arose during the tumultuous days of the Vietnam War, when a man was arrested for wearing a jacket that said "Fuck the Draft" into the Los Angeles County Courthouse. *Id.* at 16.

allow the criminalization of offensive words.[170] Liability could only be incurred for "personally abusive epithets" and "direct personal insult[s]."[171] Then, in *Gooding v. Wilson*, the doctrine settled in its current form when Justice Brennan excised offensive words from the test, limiting its scope to those words with "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[172]

Finally, in 1992, the Court in *R.A.V. v. City of St. Paul*[173] applied the doctrine to a St. Paul hate-crime-prevention ordinance, which the Minnesota Supreme Court had interpreted as punishing only fighting words.[174] A Justice Scalia-led majority found that even within an unprotected category of speech such as fighting words, an ordinance may not discriminate on the basis of content.[175] Even though the ordinance permissibly contemplated fighting words, it punished only those fighting words that expressed racist ideas.[176] The Court recalled the language of *Chaplinsky*, observing that fighting words are not "worthless and undeserving of constitutional protection . . . [and we] have not said that they constitute *no* part of the expression of ideas, but only that they constitute no *essential* part of any exposition of ideas."[177]

The *R.A.V.* Court went on to explain that the First Amendment permits the criminalization of fighting words not because they are without value but because they can trigger violence.[178] The average community member will be unable to resist immediately breaching the peace in response to fighting words, and the government's interest in avoiding this outcome outweighs the speech's value. In light of this re-imagined rationale, the fighting words doctrine is extremely narrow: the government can punish only personally insulting words spoken in a face-to-face encounter that are likely to cause an immediate breach of the peace by the addressee, and only so long as the statute or ordinance does not penalize words based on their content or message.

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[170] *Id.* at 26. Justice Harlan also famously quipped, "[O]ne man's vulgarity is another's lyric." *Id.* at 25.

[171] *Id.* at 20.

[172] 405 U.S. 518, 524 (1972) (quoting *Chaplinsky*, 315 U.S. at 573) (internal quotation mark omitted). A man was convicted under a Georgia statute criminalizing "opprobrious words or abusive language" for saying to a police officer: "'White son of a bitch, I'll kill you . . . You son of a bitch, I'll choke you to death . . . .'" *Id.* at 534 (Blackmun, J., dissenting).

[173] 505 U.S. 377 (1992).

[174] *Id.* at 380.

[175] *Id.* at 386.

[176] *Id.* at 391.

[177] *Id.* at 385 (quoting *Chaplinsky*, 315 U.S. at 572) (internal quotation marks omitted).

[178] *Id.* at 386 ("[T]he exclusion of fighting words from the scope of the First Amendment simply means that, for the purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a nonspeech element of communication." (internal quotation marks omitted)).

b. True threats.—The government may punish speech when it rises to the level of a true threat. However, the burden falls on the government to prove that the speech constitutes a true threat and not some kind of "political hyperbole."[179] The true threat standard requires that "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[180] Even if the speaker has no intention of actually committing a violent act, the speech can still be punishable.[181] Intimidation, which requires that a speaker direct a threat to an individual with "the intent of placing the victim in fear of bodily harm or death," is a subtype of true threat.[182] The state's interest in protecting its citizenry from the fear of violence and from the potential for violence itself justifies these restrictions.[183]

The Court has not provided guidance on what constitutes a true threat beyond *Virginia v. Black*. The circuits have filled in the gaps with two types of tests: objective and subjective.[184] A majority of the circuits uses an objective test, requiring the jury to determine if the alleged speech would be determined by a reasonable person to be a threat.[185] An alternative subjective approach, advocated by Justice Marshall in *Rogers v. United States*, requires the speaker to actually intend to convey a threat.[186] The Ninth[187] and Fourth[188] Circuits have used this test, but neither circuit has employed it consistently, and both have generally opted for an objective test.[189] The Court's definition of true threats in *Black* required a speaker to "mean[] to communicate a serious expression of an intent to commit an act of unlawful violence,"[190] which suggests a subjective intent requirement. However, subsequent courts have been unwilling to abandon the objective

[179] Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

[180] Virginia v. Black, 538 U.S. 343, 359 (2003).

[181] *Id.* at 360.

[182] *Id.*

[183] *Id.*

[184] *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 302 (2002).

[185] *Id.* There is disagreement amongst courts that have adopted this approach as well; some have adopted a "reasonable listener" approach, while others have opted for a "reasonable speaker" method. *Id.* The Second Circuit uses an objective test but also requires that the violence threatened be imminent. United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976).

[186] 422 U.S. 35, 47 (1975) (Marshall, J., concurring).

[187] United States v. Twine, 853 F.2d 676, 680 (9th Cir. 1988).

[188] United States v. Patillo, 438 F.2d 13, 16 (4th Cir. 1971).

[189] Rothman, *supra* note 184, at 308.

[190] Virginia v. Black, 538 U.S. 343, 359 (2003).

approach on such a vague statement, and it is likely that it will remain the dominant standard.[191]

6. Summarizing the Contours of IIED After Snyder.—The Court took pains to keep the *Snyder* decision narrow. However, the opinion's logic makes it likely that IIED claims for pure speech related to public issues are barred unless the speech rises to the level of a true threat. Chief Justice Roberts emphasized that the protests took place from 1,000 feet away.[192] But suppose the Westboro members with the same signs had conducted a protest in Albert Snyder's face. A court confronting this situation would have had to decide whether the "overall thrust and dominant theme" of the speech concerned a public issue.[193] If, as in *Snyder*, they concluded that it did, it would seem unlikely that the signs or abuses could constitute personally abusive epithets under the modern fighting words standard and would be immunized.

The Court's jurisprudence on true threats suggests that *Snyder* should not bar an IIED claim when the offending public speech constitutes a true threat. Speech on public issues may be more likely to fall into the "mere hyperbole" category that *Watts* protected,[194] but even public speech could cause a reasonable listener to fear violence. For instance, a statement like "My kid died in the war you support; now I'm going to find your kids and kill them too" could rise to the level of a true threat if it were reasonable for the parents to fear for the safety of their child. Thus, *Snyder* should bar IIED claims when distressing speech relates to a matter of public concern, so long as that speech is not a true threat. The above explanation of the Court's (somewhat cryptic) IIED pronouncements can therefore be synthesized to constitutionally bar IIED claims for most nondefamatory speech about public figures and when the speech is related to issues of public concern. In the next Part, I will explain why the First Amendment should also immunize distressing speech about a private figure that relates to a matter of private concern.

II. TOWARDS PROTECTION FOR PRIVATE INJURIOUS SPEECH

Immunizing would-be tortfeasors for distressing speech that is not a true threat and relates to a matter of public concern gives rise to two additional questions. First, how is one to distinguish between public and private matters? Second, may a private figure sue over speech that

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[191] *See, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004) (citing *Black* but still employing an objective standard); *see also* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1261 (2006) (arguing that some courts interpreted *Black* to sanction the traditional objective approach).

[192] Snyder v. Phelps, 131 S. Ct. 1207, 1218 (2011).

[193] *See supra* note 159 and accompanying text.

[194] *See supra* notes 179–83 and accompanying text.

intentionally caused her emotional distress with respect to a matter of private concern?[195]

In the following sections, this Note gives three reasons why the First Amendment should bar most pure-speech IIED cases. First, it is ultimately too difficult to distinguish between public and private matters for that distinction to support a reliable legal test. Moreover, compensating emotional harm for nonthreatening speech runs a high risk of punishing speech for its viewpoint. Finally, nonfalse distressing speech related to a private matter is distinct from private defamatory speech because it has some value and therefore receives more protection. The First Amendment thus immunizes distressing, nonthreatening speech related to matters of private concern. With these constitutional limits in place, the final section of this Part addresses and refutes some potentially troubling consequences.

A. Difficulties in Distinguishing Between Public and Private Matters

Justice Alito was skeptical of the majority's finding in *Snyder* that speech is a matter of public concern when its "overall thrust and dominant theme" regard a public issue.[196] He saw no reason to excuse private barbs from liability just because the speaker surrounded them with protected public speech.[197] Even setting aside Justice Alito's concerns, the majority's approach gives rise to significant questions. The Court indicated that matters of public concern encompass speech that "can be fairly considered as relating to any matter of political, social, or other concern to the community, or [to the] subject of legitimate news interest."[198] But these principles do little more than restate the proposition that the First Amendment protects speech regarding a matter of public concern, and they will likely provide little guidance, especially in close cases.

The line of related defamation jurisprudence, where similar determinations must be made, exemplifies the difficulty that can arise in determining whether a matter is of public or private concern. The inconsistent positions of Justices Powell and Brennan, two of the key architects of modern defamation law, show that a one-size-fits-all definition may be unattainable. In *Gertz*,[199] Justice Powell expressed doubts about the ability of a court to differentiate between public and private matters and therefore determined that the inquiry should focus on the

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[195] Notably, IIED cases involving distressing conduct, rather than pure speech, are irrelevant to this analysis. The First Amendment will not bar recovery for those forced to witness grisly and disturbing scenes of death or mutilation or those distressed by the intentional mishandling of a family member's body. Rare situations such as these do not implicate constitutional concerns.

[196] *Snyder*, 131 S. Ct. at 1226 (Alito, J., dissenting).

[197] *Id.* at 1226–27.

[198] *Id.* at 1216 (majority opinion) (quoting Connick v. Myers, 461 U.S. 138, 146 (1983); City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (per curiam)) (internal quotation marks omitted).

[199] *See supra* notes 99–102 and accompanying text.

plaintiff's public or private status.[200] Justice Brennan, in dissent, argued that the truly difficult inquiry is whether a person is a public figure.[201]

Dun & Bradstreet[202] found Justices Powell and Brennan once again at odds. This time, however, Justice Powell had no problem differentiating between public and private matters in finding an award of punitive damages appropriate in the context of a private matter.[203] Justice Brennan, again in dissent, chastised the holding and retreated from his dissent in *Gertz* to argue that the plurality offered "nothing at all" in the way of guidance as to what constitutes a public concern.[204] The only hallmark of private concern he gleaned from Justice Powell's opinion was that the speech was related solely to a business audience and was "solely motivated by the desire for profit."[205] Justice Brennan then dismissed this as a basis for differentiating between public and private concern, as speech on economic matters is not entitled to less constitutional protection.[206]

The challenges manifest in distinguishing between private and public concerns have been exacerbated by modern technology. The Internet has made widespread dissemination of ideas and personal information easier than at any time in history. This ubiquitous sharing of information and data has irrevocably blurred the line between public and private issues. Social networking sites and dynamic media platforms have made "public" information that in bygone eras may have been shared with only the most intimate of compatriots. Is personal information on a Facebook page strictly a matter of private concern? Does it remain so if the page is open to viewing from the public? Does the "publicness" of the information depend on how many visitors there are to the page?

It is easy to imagine a difficult situation like this occurring in an IIED claim. Suppose an irate teenager posts a video on YouTube excoriating a former friend after the two have a falling-out. The clip reveals embarrassing information about the former friend's sexual proclivities, verbally assaults her, and causes her great emotional distress. Nothing in the clip has anything to do with a traditional matter of public concern. Now suppose that the clip goes viral and gets 1,000,000 hits and is subsequently featured on television shows that harvest popular clips from the Internet.[207] It could no longer be gainsaid that the clip is private. While some might

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[200] 418 U.S. 323, 346 (1974).

[201] *Id.* at 363–64 (Brennan, J., dissenting) (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46–47 (1971)).

[202] *See supra* notes 103–04 and accompanying text.

[203] 472 U.S. 749, 761–62 (1985).

[204] *Id.* at 786–87 (Brennan, J. dissenting).

[205] *Id.* at 787.

[206] *Id.* (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952); Am. Fed'n of Labor v. Swing, 312 U.S. 321, 325–26 (1941); Thornhill v. Alabama, 310 U.S. 88, 101–03 (1940)).

[207] *See, e.g.*, *Tosh.0* (Comedy Central television broadcast).

argue that public availability does not make something a matter of public concern, if enough people wish to access speech, it becomes public, regardless of its embarrassing or distressing content. It would be difficult to draw a definitive line where speech becomes a matter of public concern, and the arbitrariness of the exercise counsels against undertaking the determination. Distinguishing between matters of public and private concern was a confounding and controversial task for Justices Brennan and Powell. Modern technology has ratcheted up this difficulty by blurring the line between the media and consumers, and it is therefore inadvisable to allow IIED liability to hinge on such a questionable determination.

B. The Danger of Punishing Speech Based on Viewpoint

In *Snyder*, the Court did not confine its criticism of IIED to the fact that Westboro's speech related to issues of public concern. Chief Justice Roberts pointed out that the same protesters, holding signs of "God Bless America" and "God Loves You," would not have been subject to tort liability and that IIED liability therefore punished Westboro for the unpopularity of its message.[208] The opinion also expressed general discomfort with IIED's outrageousness standard.[209]

Outrageousness defies precise definition, but from its inception, courts have cast it as an objective standard[210]: generally, only speech that would outrage "an average member of the community" is subject to liability.[211] Juries must therefore tackle the imprecise task of ascertaining the values of this community everyman. Average community sensibilities are dynamic and vary depending on the population included in the "community."[212] In practice, the "community standard" is often similar to a reasonableness standard.[213] Jurors, sure to think themselves "reasonable people," will be tempted to elevate their own subjectivities into their determinations. Hence, this standard invites jurors in any IIED case to insert their own values into determining outrageousness.[214] In so doing, jurors may impose liability based on their "tastes or views, or perhaps on the basis of their dislike of a particular expression."[215] Unpopular and caustic views are more likely to

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[208] Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011).

[209] *Id*.

[210] *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

[211] *Id*.

[212] *See* Bradley J. Shafer & Andrea E. Adams, *Jurisprudence of Doubt: Obscenity, Indecency, and Morality at the Dawn of the 21st Century*, MICH. B.J., June 2005, at 22, 24.

[213] *See* Pope v. Illinois, 481 U.S. 497, 501 n.3 (1987) (noting in the obscenity context that a reasonableness standard is functionally similar to a "contemporary community standard[]").

[214] *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510 (1984).

[215] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988).

outrage jurors, regardless of whether the speech relates to a matter of public or private concern.[216]

Even assuming a juror is able to resist favoring her own views and faithfully apply the norms of the community, those with the most offensive views and the sharpest tongues risk upsetting the sensibilities of twelve of their peers and incurring liability.[217] A statement that is outrageous to ninety-nine percent of the community is not to the remaining one percent, including the speaker. The First Amendment forbids the sensibilities of the ninety-nine percent from punishing the viewpoint of the one percent.[218] The outrageousness standard, in the hands of a jury, poses a "real danger" of serving as an instrument of suppression for unpopular and offensive speech.[219]

Punishing speech based on viewpoint is anathema to the "bedrock principle underlying the First Amendment . . . that the government may not prohibit [or punish] the expression of an idea simply because society finds the idea itself offensive or disagreeable."[220] By enforcing a jury verdict, the government is sanctioning the "average" view of outrageousness and thereby punishing speech for its viewpoint. While IIED claims differ from traditional speech restrictions because they arise in the context of a civil suit rather than by statute,[221] the exercise of judicial power is nevertheless state action subject to the First Amendment.[222] If the government tried to pass a statute banning or restricting outrageous speech to promote the public's peace of mind, it would almost certainly fail.[223] Allowing a jury to penalize an offensive speaker with tort liability is to "allow the government to produce a result which [it] could not command directly" through statute.[224]

The result in *R.A.V. v. City of St. Paul*[225] further illustrates the constitutional flaws of penalizing outrageous speech. Writing for the Court, Justice Scalia refused to sanction a statute that reached only unprotected fighting words, underscoring the First Amendment's hostility toward

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[216] *See Bose Corp.*, 466 U.S. at 510.

[217] Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011).

[218] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) (collecting caselaw).

[219] *Bose Corp.*, 466 U.S. at 510.

[220] *Johnson*, 491 U.S. at 414.

[221] *See, e.g.*, *id.* at 400–02 (holding that a conviction for violation of a flag burning statute could not stand under the First Amendment).

[222] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("It matters not that that law has been applied in a civil action and that it is common law only . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.").

[223] *See* Gooding v. Wilson, 405 U.S. 518, 527 (1972).

[224] Perry v. Sindermann, 408 U.S. 593, 597 (1972) (alteration in original) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)) (internal quotation marks omitted).

[225] 505 U.S. 377 (1992).

viewpoint- and content-based regulations.[226] St. Paul would have been free in that case to pass a statute criminalizing all fighting words, but it could not constitutionally criminalize only racist fighting words.[227]

A similar problem arises in IIED claims. Private, outrageous speech may rise to the level of fighting words.[228] However, not all fighting words will be outrageous enough to support an IIED claim. There are many "invitation[s] to exchange fisticuffs"[229] that would not strike the average community member as outrageous. Moreover, fighting words are proscribable because of their ability to cause a breach of the peace, not because of their outrageousness. "The proposition that a particular instance of speech can be proscribable on the basis of one feature . . . but not on the basis of another . . . is commonplace."[230] To reserve liability only for those particular fighting words a jury finds outrageous thus unconstitutionally discriminates on the basis of the speech's content and viewpoint.[231]

True threats present a different scenario. Like fighting words, they can be punishable on the basis of one feature (e.g., placing in fear of violence) and not on the basis of another (e.g., outrageousness).[232] IIED actions that are brought as a pretext to punish fighting words attempt to punish the words for the internal distress caused by their offensiveness. Such suits do not align with the reason fighting words are unprotected: the words' ability to act as a trigger to action and cause a breach of the peace. An IIED action against a true threat, however, seeks to punish speech for placing the listener in the distress that accompanies the anticipation of violence. This internal distress and fear is the evil that the true threats doctrine seeks to combat, and it is being curtailed by IIED actions just as it would under a criminal statute. Courts in IIED claims therefore could introduce a presumption that all true threats are sufficiently outrageous to support liability. Alternatively, every jurisdiction could criminalize true threats or create a private cause of action, which would make the IIED claim for a true threat unnecessary.[233] Ultimately, this difficulty illustrates how the entire enterprise of subjecting outrageous speech to tort liability is problematic because of the invitation to punish speech for its viewpoint alone.

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[226] *Id.* at 381.

[227] *Id.* at 384–86.

[228] Private barbs may qualify as fighting words even after the narrowing of the doctrine to include only those "words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Gooding*, 405 U.S. at 524 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942)) (internal quotation marks omitted).

[229] Texas v. Johnson, 491 U.S. 397, 409 (1989).

[230] *R.A.V.*, 505 U.S. at 385.

[231] *Id.* at 384–86.

[232] *Id.* at 385.

[233] Many states have already enacted statutes criminalizing or prohibiting various types of threatening speech and behavior. *See* Rothman, *supra* note 184, at 366 & n.334.

C. The Value of Private, Injurious Speech

First Amendment jurisprudence requires that courts balance society's interest in regulating speech against the value of the speech itself. In the IIED context, not only does the potential for viewpoint-based censorship interfere impermissibly with protected First Amendment interests, offensive speech also has positive value. It may seem counterintuitive to propose that we should value malicious and injurious speech,[234] and it may not receive the same level of First Amendment protection as core political speech.[235] But several commentators have argued that speech can be valuable for more reasons than its ability to contribute to the public discourse. Because of its subjectivity, tort law is only an appropriate mechanism for speech regulation in those areas of speech that the Court has deemed completely unprotected, such as defamation or true threats, and cannot be employed for an IIED action unless the speech falls into such a category.[236] In the following sections, the contributions of these scholars and jurists are laid out, the standard is applied, and an opposing viewpoint is rebutted.

1. Methods of Valuing Private, Injurious Speech.—Many commentators rely on a "marketplace of ideas" paradigm to suggest that speech about political matters or which relates to self-governance occupies the highest rung on the hierarchy of speech.[237] Others, however, point to a different paradigm. Professors Baker and Redish argue that to tie speech's value solely to the marketplace of ideas or political self-governance unduly limits the scope of the First Amendment.

Professor Baker contends that the classical marketplace of ideas theory is insufficient and proposes instead what he calls a liberty model.[238] He argues that the purpose of free speech is to protect the value it has to the individual, rather than some greater societal good.[239] Focusing on individual autonomy, Baker urges protection of any speech that helps to define or develop one's sense of self.[240] Regardless of the effect it might have on

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[234] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[235] *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (contending that the First Amendment should protect political speech alone).

[236] The Court has indicated that it is not interested in carving out any new categories of unprotected speech, so it is unlikely that it would do so for private distressing speech. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) (declining to carve out a category of unprotected speech for depictions of animal cruelty and explaining that new categories of unprotected speech should be identified only in the rarest of circumstances).

[237] *See e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24–28 (1960); Bork, *supra* note 235, at 20.

[238] *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964 (1978).

[239] *Id.* at 966.

[240] *Id.* at 992.

others, Baker argues, speech deserves constitutional protection when it leads to self-fulfillment, self-expression, or autonomy.[241]

Like Baker, Professor Redish acknowledges self-expression as the core element that makes speech worthy of protection, but he argues that Baker's theory does not go far enough in protecting an individual's right to self-actualize.[242] Redish further argues that our focus on so-called political speech captures just a sliver of the overall picture. To him, the true values of speech are the "intrinsic" value of individual control of one's own destiny and the "instrumental" value of developing one's human faculties.[243] While angry and hurtful outbursts on the street may not develop a speaker's intellectual faculties, Professor Redish points out that the human experience contains "an emotional element . . . that can be 'developed' by such 'non-rational' forms of communication."[244]

In addition to the potential value of private, distressing speech to the individual speaker, it can also hold value in the marketplace of ideas as conceptualized in the American constitutional consciousness. The marketplace is not always a place for the reasoned exchange of competing ideas in the search for truth,[245] nor is it concerned only with political speech or speech related to self-governance.[246] Under these metrics, it might be difficult to place value on private, distressing speech. However, the vision of the marketplace that permeates First Amendment thought is considerably less refined. The Court has emphasized: "[A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[247]

This notion of an unrefined, rough-and-tumble marketplace of ideas can be detected in the writings of Justice Holmes, whose dissent in *Abrams v. United States* is often cited as a foundation of the marketplace paradigm.[248] While Justice Holmes's elegant, short prose is often held out as a simple tribute to the free exchange of ideas, closer examination shows a more layered complexity.[249] Justice Holmes was skeptical about the notion of absolute truth, once suggesting that truth is "the majority vote of that nation that could lick all others."[250] He was also a noted Social

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[241] *Id.* at 994.

[242] *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 619–22 (1982).

[243] *See id.* at 602–03.

[244] *Id.* at 628.

[245] *See* JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJECTION OF WOMEN: THREE ESSAYS 5, 22–27 (Oxford Univ. Press 1960) (1859).

[246] *See, e.g.*, MEIKLEJOHN, *supra* note 237.

[247] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[248] 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

[249] Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 2.

[250] Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

Darwinist—a firm believer in the survival of the fittest.[251] These values contributed to the way that Justice Holmes viewed the marketplace of ideas. Rather than Mill's conception of a place where dissenting opinions and viewpoints contribute to the collective knowledge and good of society, Justice Holmes saw the protection of speech as essential to the power struggle between different factions trying to gain dominance with the superiority of their ideas.[252]

Viewing the American marketplace as Justice Holmes did, speech need not be protected as a utilitarian instrument working towards some common good. The marketplace can also protect *speakers* and act as an invaluable counterweight to the status quo, by allowing unpopular dissidents to voice controversial and unpopular opinions. Offensive and injurious ideas have a place in this marketplace; they can challenge the establishment's conceptions of outrageousness and help speakers and factions advance their agendas, however unpopular. It should not be troubling if "the air [is] at times . . . filled with verbal cacophony[, which is] not a sign of weakness but of strength."[253]

2. Consequences of Attributing Value.—If we view hurtful and distressing statements through one of these frames, we can imagine value to the speech. Suppose a malicious citizen approaches a grieving neighbor that he knows to have recently lost a child and tells him, "I'm glad your son died. He was an annoying little boy, and we are much better off without him." Assuming these words are outrageous, they are not valueless simply because they were directed at a private person about a private matter. Even disfavored categories of speech are not completely valueless; the Court has merely determined that the social harm they cause outweighs their slight value.[254] Speech that crosses that line into one of these categories is unprotected only because at that point society's interest in avoiding the harm it causes exceeds its value.

Perhaps by hurling hurtful invectives, the neighbor is able to throw off his inhibitions about speaking his mind and therefore become a more complete person (albeit one in need of considerable refinement). Perhaps the unmannered brute has had a terrible day and is on the verge of explosion when he is able to blow off some steam by attacking his neighbor. Even if the person is just an ill-tempered eugenicist and actually wishes for the death of annoying children, expressing this sentiment may be quite fulfilling.

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[251] *See* Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J.L. & HUMAN. 35, 58–61 (2010).

[252] *Id.* at 39–40.

[253] Cohen v. California, 403 U.S. 15, 25 (1971).

[254] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 384–85 (1992).

Professor Smolla has expressed concern about a First Amendment bar to IIED claims by a private person regarding a private matter.[255] He fears constitutional schema would end up swallowing the entire tort, and he considers IIED doctrine sufficient to protect speech with constitutional value.[256] He takes a cue from *Dun & Bradstreet* in reaching his conclusion that the First Amendment has little to say about distressing speech towards a private person about a matter of private concern. But the material difference between *Dun & Bradstreet* and the dead-child scenario is the value of the speech. The false credit scores in *Dun & Bradstreet* were completely unprotected because they were false and defamatory.[257] While we do often protect defamatory statements, it is because we seek to avoid incidentally chilling valuable speech, not because of the value in the defamatory falsehoods themselves.[258] It is only when speech about a private matter is directed at a private person, as in *Dun & Bradstreet*, that our fear of speech chilling subsides enough to allow liability upon a showing of mere negligence.[259] As hurtful as the cruel neighbor's comment is, it is not a false and defamatory statement, nor does it fall into another forbidden category of speech. An IIED action against the discourteous neighbor undermines the value of the comment at the expense of the historically disfavored interest in emotional tranquility. Unlike in the context of a defamation action like *Dun & Bradstreet*, the First Amendment bars this IIED action.

Of course assigning value to private, distressing speech does not mean that it can never be regulated. The value of the speech to the speaker must be balanced against the listener's right not to be disturbed and society's interest in tranquility. The speech could therefore be subject to reasonable time, place, and manner restrictions.[260] What makes the current structure for IIED claims so problematic is the inconsistency and subjectivity that are unavoidable in the application of an outrageousness standard. If the state wished to protect the tranquility of its citizens, it could enact a speech restriction that met the requirements of time, place, and manner restrictions.[261]

There have been and will be plenty of situations where speech directed at a private person on an issue of private concern may be sufficiently outrageous that a jury would assign liability if permitted. Smolla suggested that in such situations, the First Amendment should yield and state tort law

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[255] *See* Smolla, *supra* note 85, at 472–74.

[256] *See id.* at 473.

[257] *See* 472 U.S. 749, 761–62 (1985).

[258] *See* Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

[259] *See* 472 U.S. at 761–62.

[260] *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[261] Content-neutral speech restrictions can be constitutional so long as they are narrowly tailored to meet a substantial state interest and leave ample alternative means for the protected expression. *Id.*

should control.[262] But because of the difficulty in distinguishing between public and private matters, the danger of punishing speech based on its viewpoint, and the value of distressing speech itself, the First Amendment should bar all pure-speech IIED claims not arising out of true threats.

D. Potential Consequences of Protecting Private, Offensive Speech

Adopting a First Amendment bar to IIED claims could raise concerns in certain situations. Today, many IIED claims may arise out of speech in the workplace or on the Internet. There are doubtless other situations where imposing a constitutional bar to IIED actions could create controversy, and the following discussion is not intended to be exhaustive. The case of sexually harassing speech illustrates a situation where a statutory remedy may be appropriate but the vagueness of IIED is not. Online speech is discussed because Justice Breyer specifically singled it out. At least in these two contexts, the First Amendment must bar IIED claims so long as the speech is not a true threat.

1. Sexually Harassing Speech.—Sexually harassing speech and other controversial speech in the workplace pose potential problems. Of course if sexually harassing speech were to put the addressee in fear of violence, it would be a true threat and the First Amendment should allow an IIED claim to proceed.[263] However, most harassment will be unlikely to rise to the level of a true threat. Because an IIED action would be left trying to compensate pure emotional harm, it should therefore be constitutionally barred.

Thankfully, victims of sexual harassment will not be remediless. Commentators have observed that the state's interest in preventing a hostile work environment is strong enough to overcome the value of sexually harassing speech in large part because sexual harassment constitutes sex discrimination and leads to gender segregation.[264] This means that the state has a compelling interest in punishing this type of speech. Indeed, assuming the harassment takes place in the workplace, the victims of these comments may have a remedy under Title VII[265] and various state statutes,[266] which function as time, place, and manner restrictions to

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[262] *See* Smolla, *supra* note 85, at 473.

[263] *See supra* notes 232–33 and accompanying text.

[264] *See, e.g.*, William R. Amlong, *The Glass Ceiling: "Sexual" Harassment as a Method of Keeping the Lid Glued Down*, *in* SEXUAL HARASSMENT IN THE PUBLIC WORKPLACE 1 (Benjamin E. Griffith ed., 2001); J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2309–10 (1999).

[265] *See* 42 U.S.C. §§ 2000e to 2000e-17 (2006).

[266] *See, e.g.*, 775 ILL. COMP. STAT. ANN. 5/2-102(D) (West 2011) (defining sexual harassment as a civil rights violation).

vindicate the state's interests.[267] Such a restriction has an especially low bar to meet in the employment context as it generally takes place in a nonpublic forum.[268] Speech restrictions in this context need only be reasonable and not viewpoint based.[269] Anti-harassment statutes are content based—they forbid speech related to a specific subject matter—but they are not viewpoint based as they apply regardless of the specific sentiment expressed in the sexual communication. There is therefore no infirmity to statutory remedies in workplace claims, and those who are harassed will not be remediless, nor will employers be hamstrung. Sexually harassing speech thus provides a useful example of a situation where a statutory remedy is appropriate but the First Amendment bars the vagaries of the tort law in an IIED claim, unless the speech is a true threat.

2. The Impact of the Internet.—Today, the Internet and the accompanying avalanche of media technologies have revolutionized the way people interact and communicate with one another. Information moves more rapidly, and across greater distances, than the architects of IIED could ever have imagined. Information can now reach almost anyone, practically instantaneously, and new media blurs the once-bright lines between newsmaker, news reporter, and news consumer. This process has further complicated the already difficult task of distinguishing between speech of public and private concern.[270]

But this communicative revolution has its downside. Exploitive, defamatory, misleading, and injurious speech now enjoys the same ease of dissemination as its more laudable counterparts. The Internet allows unfiltered and abrasive messages to reach a wider audience than more tightly controlled traditional media outlets; a malicious message board poster can reach thousands of readers instantly. Moreover, e-mail, Facebook, Twitter, and the like leave indelible records; the injury can thus persist for longer than a traumatic comment delivered in person. For example, the epic in *Snyder* continued to torment and exacerbate the emotional suffering of Albert Snyder even after pain from the initial trauma on the day of the funeral may have otherwise begun to dull.[271]

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[267] Title VII harassment law may itself be the subject of constitutional controversy. For a discussion of Title VII harassment claims and possible First Amendment challenges to the law, see Robert Post, *Sexual Harassment and the First Amendment* 1–4, 21–26 (Inst. of Governmental Studies, Working Paper No. 2000-13), *available at* http://escholarship.org/uc/item/3wm307xp#page-1.

[268] This is true even if the employer is the federal government. Not all government property is a public forum where speech rights are at their height. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

[269] *Id.*

[270] *See supra* Part II.A.

[271] *See supra* notes 128–30 and accompanying text.

It is hard to see why the First Amendment should protect speech of public concern online any differently than in the pages of a magazine.[272] While an incendiary website such as Westboro's may be extremely offensive, there is no principled reason for treating these platforms any differently than a newspaper or other traditional media outlet, and to protect the distressing speech published unless it is a true threat.[273] Moreover, the Internet also provides a ready forum for counter-speech—the provision of additional speech to counteract the deleterious effects of harmful speech is typically the preferred method of minimizing harm.[274] Of course, Westboro's epic in *Snyder* was an example of speech that may have related to private matters.[275] Though the Court did not address the epic in its opinion, the dynamic medium of the Internet seemed to concern Justice Breyer during *Snyder*'s oral arguments,[276] and his concurrence stressed that the Court's majority opinion did not reach these issues.[277] But Justice Breyer did not take a firm position, and he indicated he was unsure what the rule should be in cases involving online IIED.[278]

Whether the injurious speech appears on a personal webpage, a message board, Facebook, or via e-mail should not affect the basic analytic framework. Take a hypothetical Facebook message sent to a private party by a former friend after a falling-out. In the message, the sender writes, "I'm sure everyone thinks you're an asshole and a self-righteous piece of

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[272] Congress recognized the speech-chilling dangers of subjecting Internet service providers (ISPs) to liability as early as 1996. When it passed the Communications Decency Act of 1996, 47 U.S.C. § 230 (2006), it sought to limit the exposure of indecent and offensive material to minors. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003). Despite this purpose, courts have construed § 230(c)'s grant of immunity broadly, refusing to hold them liable even if they were guilty of dilatory or negligent conduct. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 331–34 (4th Cir. 1997).

[273] *See* discussion *supra* Part II.A–C; *see also* Planned Parenthood of the Columbia/Wilmette Inc. v. Am. Coalition of Life Activists, 244 F.3d 1007, 1019–20 (9th Cir. 2001), *aff'd in part en banc*, 290 F.3d 1058 (9th Cir. 2002) (finding an antiabortion website that named abortion doctors and contained imagery which arguably encouraged violence against them to be protected because the language itself did not threaten or advocate violence against them).

[274] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2550 (2012) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.").

[275] Westboro would likely argue that the epic related to a public matter, and the line is a devilishly difficult one to draw. *See supra* Part II.A. Another example of arguably private online speech was at issue in *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011). A high school student created a MySpace.com page called "Students Against Sluts Herpes," or "S.A.S.H.," that specifically targeted a classmate. *Id.* at 567. Because the suit was brought by the student who posted the offensive material against the school district for the punishment she received, the court's analysis did not focus on IIED, but it is easy to imagine the victim of the abuse bringing suit and forcing a court to determine if the speech was private or public.

[276] *See* Transcript of Oral Argument at 12–13, Snyder v. Phelps, 131 S. Ct. 1207 (2011) (No. 09-751).

[277] *Snyder*, 131 S. Ct. at 1221–22 (Breyer, J., concurring).

[278] Transcript of Oral Argument at 20–21, *Snyder*, 131 S. Ct. 1207 (No. 09-751).

shit. You are so ugly and boring that it would be better off for everyone if you would just crawl into a hole and die!" This unrefined tirade has value.[279] It is also not defamatory nor does it fall into one of the other unprotected categories of speech. Such invectives certainly have the potential to cause distress, and perhaps more so if the sender opts for a publicly viewable online forum. Still, the difficulties in punishing this speech using tort law are too great, and IIED is an inappropriate tool for targeting the evils of this speech.[280] This speech should therefore receive First Amendment protection unless it rose to the level of a true threat, which would leave the speech unprotected and appropriate for tort liability.[281]

CONCLUSION

Although the Court has not yet considered whether the First Amendment protects emotionally distressing speech directed at a private person regarding a matter of private concern, it should find such speech to be protected. Tort law and the outrageousness standard is an inappropriate vehicle for punishing this type of speech. The Internet and new media have blurred the line between public and private matters, a development that has increasingly rendered the old distinctions both impracticable and obsolete. Moreover, the outrageousness standard does little more than invite a jury to punish speech based on its viewpoint alone—a result forbidden by the First Amendment. Finally, injurious private speech has value both to the speaker and in the uniquely American marketplace of ideas. Of course, when the First Amendment protects speech, its protection is not absolute, and words that independently constitute true threats should continue to support IIED liability. Ultimately, this standard will leave some people exposed to injurious, hurtful, and personal commentary without legal recourse. But once we accept that the First Amendment protects almost all speech—not just political speech or speech regarding matters of public concern—we must acknowledge that even those of us who are not public figures must press on in the face of "vehement, caustic, and sometimes unpleasantly sharp attacks."[282]

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[279] *See supra* Part II.C.

[280] *See supra* Part II.A–C.

[281] Cases of this ilk have begun to arise over the course of the last decade. For example, in 2010, a New Jersey appellate court refused to require disclosure of the owner of a pseudonymous e-mail address used to send distressing messages to a high school teacher. Juzwiak v. Doe, 2 A.3d 428, 434–35 (N.J. Super. Ct. App. Div. 2010). The court engaged in an outrageousness analysis but noted that even if the speech were outrageous (which it was not), it would have to rise to the level of an objective threat before it would require disclosure of the sender's identity. *Id.* at 433; *see also* D.C. v. R.R., 106 Cal. Rptr. 3d 399, 419–27 (Ct. App. 2010) (denying high school student defendants' motion to strike a complaint where their virulent posts on message boards were potentially true threats).

[282] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).